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No.

In the Supreme Court of the United States

CHARLES DEMORE, DISTRICT DIRECTOR, ET AL., PETITIONERS

v.

HYUNG JOON KIM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1226(c)(1) of Title 8 of the United States Code requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed a specified offense, including an aggravated felony. Section 1226(c)(2) of Title 8 prohibits release of those aliens during administrative proceedings to remove them from the United States, except in very limited circumstances not present here. The question presented in this case is:

Whether respondent's mandatory detention under Section 1226(c) violates the Due Process Clause of the Fifth Amendment, where respondent was convicted of an aggravated felony after his admission into the United States.

PARTIES TO THE PROCEEDING

In addition to the District Director of the San Francisco District of the Immigration and Naturalization Service, the Attorney General of the United States was named as a respondent in the underlying habeas corpus proceeding in this case and is a petitioner in this Court. See note 2, *infra*.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the District Director of the San Francisco District of the Immigration and Naturalization Service (INS) and the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 276 F.3d 523. The memorandum order of the district court (App., *infra*, 31a-51a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. Section 1226(c) of Title 8 of the United States Code provides:

> **Detention of criminal aliens**
>
> **(1) Custody**
>
> The Attorney General shall take into custody any alien who—
>
> **(A)** is inadmissible by reason of having committed any offense covered in section 1182(a)(2) of this title,
>
> **(B)** is deportable by reason of having committed any offense covered in section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of this title,
>
> **(C)** is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence [*sic*] to a term of imprisonment of at least 1 year, or

> **(D)** is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,
>
> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> **(2) Release**
>
> The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to section 3521 of title 18 that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

8 U.S.C. 1226(c).

STATEMENT

1. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546, amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to streamline procedures for removing certain criminal aliens

from the United States. As the House Report on IIRIRA explained, Congress concluded that "our immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. I, at 111 (1996). Congress further determined that "[a]liens who enter or remain in the United States in violation of our law are effectively taking immigration opportunities that might otherwise be extended to others, potential legal immigrants whose presence would be more consistent with the judgment of the elected government of this country about what is in the national interest." S. Rep. No. 249, 104th Cong., 2d Sess. 7 (1996).

The provision of IIRIRA that is at issue in this case is Section 236(c) of the INA, 8 U.S.C. 1226(c). Section 1226(c)(1) requires the Attorney General to take into custody aliens who are inadmissible to or deportable from the United States because they have committed specified crimes. In the case of deportable aliens, Section 1226(c)(1) applies when the alien has been convicted of an aggravated felony (as defined in 8 U.S.C. 1101(a)(43)); two or more crimes involving moral turpitude or a crime of moral turpitude that resulted in a sentence of at least one year's imprisonment; a controlled-substance offense, other than simple possession of 30 grams or less of marijuana; a firearms offense; certain crimes such as espionage, sabotage, treason, and threatening the President; and certain immigration offenses. See 8 U.S.C. 1226(c)(1), 1227(a)(2). Section 1226(c)(2) prohibits release of those aliens during the pendency of administrative proceedings instituted to remove them from the United States, except in very

limited circumstances involving witness protection. 8 U.S.C. 1226(c)(2).

Detention under Section 1226(c) lasts only for the duration of the criminal alien's administrative removal proceedings.[1] Detention of an alien following entry of a final order of removal is governed by Section 241(a) of the INA, 8 U.S.C. 1231(a), which this Court interpreted in *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

2. Respondent is a native and citizen of the Republic of Korea (South Korea). He entered the United States legally in 1984 and became a lawful permanent resident of the United States in 1986, when he was eight years old. App., *infra*, 2a, 32a. On July 8, 1996, when he was 18 years old, respondent was convicted in California state court of first degree burglary. In 1997, he was convicted of "petty theft with priors," in violation of California Penal Code Sections 666 and 484, and received a sentence of three years' imprisonment. See *id.* at 2a, 32a.

In December 1998, while respondent was serving his three-year sentence, the INS charged him with being deportable because of his 1997 conviction for an aggravated felony. App., *infra*, 32a; see 8 U.S.C. 1101(a)(43)(G), 1227(a)(2)(A)(iii). Respondent was released from state prison on February 1, 1999. On February 2, 1999, the INS took respondent into custody under Section 1226(c) and commenced removal proceedings against him. App., *infra*, 2a, 32a. In light of the mandatory nature of Section 1226(c), the INS's San

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[1] In Section 304(a) of IIRIRA, 110 Stat. 3009-587 to 3009-593.5, Congress instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are excludable at the border. See 8 U.S.C. 1229, 1229a.

Francisco District office declined to release respondent on bond. See *id.* at 33a; C.A. E.R. 3.

3. On May 17, 1999, respondent filed a habeas corpus petition under 28 U.S.C. 2241 in the United States District Court for the Northern District of California. App., *infra*, 31a, 33a. Respondent asserted in his petition that Section 1226(c) is unconstitutional on its face because mandatory detention of criminal aliens, without an individualized bond hearing, violates substantive and procedural due process guaranteed by the Fifth Amendment. *Id.* at 33a. Respondent did not dispute that he is deportable as an aggravated felon. See C.A. E.R. 1.[2]

On August 11, 1999, the district court declared Section 1226(c) facially unconstitutional and ordered an individualized bond hearing to determine whether respondent presented a flight risk or a danger to the community. App., *infra*, 31a-51a. Using the analytic framework of *United States* v. *Salerno*, 481 U.S. 739, 747 (1987), the district court reasoned that Section 1226(c) violates due process because "lawful resident aliens possess substantive due process rights during deportation proceedings," App., *infra*, 39a, and "[l]ess

[2] Respondent brought his habeas corpus action against the District Director of the San Francisco District of the INS and the Attorney General of the United States. The District Director was the custodian of respondent Kim and present in the Northern District of California, and therefore was the proper respondent to the habeas corpus petition filed by Kim under 28 U.S.C. 2241 in that district. The Attorney General, who unlike the District Director was not Kim's immediate custodian and was not present in the Northern District of California, was not a proper respondent to the habeas petition. See *Schlanger* v. *Seamans*, 401 U.S. 487 (1971); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 122 S. Ct. 43 (2001).

excessive means exist for accomplishing Congress's goals [in enacting Section 1226(c)], such as having individualized bail hearings," *id.* at 45a. Although the district court thus focused specifically on the due process rights of lawful permanent resident aliens, the court's holding was that Section 1226(c) "is unconstitutional on its face." *Id.* at 48a. In the alternative, the district court held that, under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), Section 1226(c) denies criminal aliens procedural due process. App., *infra*, 48a-50a. After the district court's decision, the District Director of the INS released respondent on $5000 bond. *Id.* at 2a. Respondent then requested a continuance of his administrative removal proceedings, and the request was granted.[3]

4. The court of appeals affirmed on the ground that Section 1226(c) violates substantive due process when applied to respondent, as a permanent resident alien. The court, however, specifically did not affirm the district court's facial invalidation of Section 1226(c). App., *infra*, 5a-6a.[4]

The court of appeals first emphasized respondent's status as a lawful permanent resident, noting that this

[3] The removal hearing initially was rescheduled for March 2002, see App., *infra*, 2a, but was continued again at respondent's request after respondent obtained new counsel.

[4] The court of appeals emphasized, in particular, that it was not addressing whether Section 1226(c) is constitutional as applied to excludable aliens who have been detained at the border. See App., *infra*, 5a-6a. In *Ma* v. *Ashcroft*, 257 F.3d 1095, 1107-1110 (2001), the Ninth Circuit held on remand from this Court that detention of excludable aliens who are subject to a final order of removal, but who cannot be removed from the United States, does not violate due process. See *Zadvydas* v. *Davis*, 121 S. Ct. 2491, 2500-2501 (2001).

"most favored" (App., *infra*, 7a) immigration status entitles an alien to live permanently in the United States, to work, and to apply for citizenship, and most often is granted because of the alien's close family ties to this country. See generally 8 U.S.C. 1151. The court concluded that, because of their statutory rights and what are often strong ties in the United States, lawful permanent resident aliens have a liberty interest in freedom from detention during removal proceedings, which the Constitution protects. App., *infra*, 7a-8a.

Relying on *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001) —in which this Court interpreted 8 U.S.C. 1231(a), governing detention following entry of a final removal order, in light of constitutional concerns—the court of appeals next held that detention of lawful permanent residents under Section 1226(c) is permissible only if the government establishes a "special justification" that outweighs the lawful permanent resident's liberty interest. App., *infra*, 11a (quoting *Zadvydas*, 121 S. Ct. at 2499).[5] The court recognized the government's interest in ensuring criminal aliens' availability for removal from the country. The court held, however, that ensuring removal does not justify mandatory detention because of the possibility that removal proceedings might not result in a final order of removal—such as when the alien is granted withholding of removal based on a likelihood of persecution in his native country or relief under former INA Section 212(c) (see *INS* v. *St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271

[5] The court of appeals also expressed the view (App., *infra*, 23a-26a) that its decision was consistent with the analysis of Justice Kennedy's dissenting opinion in *Zadvydas*, 121 S. Ct. at 2507-2517.

(2001)),[6] or when the crime on which the alien's removal was sought is later held not to be an aggravated felony. App., *infra*, 13a-15a.

The court also rejected the government's reliance on a 1996 Justice Department study that showed that 89% of non-detained aliens subject to a final removal order avoided removal. The court believed that the study counted aliens who had been released on bail as "detained," and that such aliens were, according to the study, likely to be removed successfully. See App., *infra*, 15a-16a (discussing Office of the Inspector General, U.S. Dep't of Justice, *Inspection Report, Immigration and Naturalization Service, Deportation of Aliens After Final Orders Have Been Issued*, Rep. No. I-96-03 (Mar. 1996) (*Deportation Report*)<http://www.usdoj.gov/oig/i9603/i9603.htm>).

Turning to the government's interest in protecting the public against additional crimes by removable criminal aliens, the court of appeals concluded that the class of aggravated felonies that trigger mandatory detention under Section 1226(c) includes crimes that are not "egregious" or inherently indicative of a public threat and, therefore, that commission of an aggravated felony is not sufficiently probative of dangerousness to establish a need for detention in all cases. App., *infra*, 16a-21a.

The court of appeals cited (App., *infra*, 21a) congressional testimony by a former Commissioner of the INS for the proposition that the government itself "appear[ed] to have some doubt about" the necessity of

[6] Respondent was convicted of his felony theft offense in April 1997 (see App., *infra*, 32a), after Congress made aggravated felons ineligible for relief from deportation under Section 212(c) of the INA. See *St. Cyr*, 121 S. Ct. at 2276-2277, 2293.

mandatory detention under Section 1226(c). The court also concluded that the necessity of mandatory detention of criminal aliens during removal proceedings is called into question by 8 U.S.C. 1231(a)(6), which gives the Attorney General discretion whether to release criminal aliens who are under a final order of removal, if those aliens have not been removed during the 90-day removal period. App., *infra*, 22a-23a.

The court of appeals disagreed with the Seventh Circuit's decision in *Parra* v. *Perryman*, 172 F.3d 954 (1999), which upheld Section 1226(c) against a due process challenge by a lawful permanent resident alien who conceded that he was removable. In the Ninth Circuit's view, the Seventh Circuit did not give sufficient weight to the liberty interest of lawful permanent resident aliens who are not yet subject to a final order of removal. The court also concluded that the Seventh Circuit had erred by relying on the 1996 Justice Department study that the court here found not to be probative. App., *infra*, 26a-27a; see p. 9, *supra*.

Finding that Section 1226(c) could not satisfy substantive due process as applied to respondent under any plausible narrowing construction (see App., *infra*, 27a-29a), the court of appeals held that a lawful permanent resident alien in removal proceedings must be afforded "a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

On April 4, 2002, the Solicitor General filed a petition for a writ of certiorari (No. 01-1459) to review the judgment of the Third Circuit in *Radoncic* v. *Zemski*, 28 Fed. Appx. 113 (2002) (No. 01-1074), which involves a due process challenge to mandatory detention under

8 U.S.C. 1226(c) by an alien who entered the United States without inspection and has at all times been unlawfully present in the United States. This case, by contrast, involves a challenge by a permanent resident alien. For the reasons stated below and in the certiorari petition in *Radoncic*, review is warranted in both cases to ensure a prompt and definitive resolution of a constitutional issue on which the circuit courts have disagreed. The question of the constitutionality of Section 1226(c) also deserves prompt and definitive resolution because that statutory provision applies to thousands of criminal aliens currently in custody and to hundreds of additional criminal aliens each week, as new removal proceedings are commenced.

1. Review by this Court is warranted to resolve confusion and disagreement among the courts of appeals about the constitutionality of an Act of Congress. The petition in *Radoncic* explains (at 13-15) that four circuits have addressed the constitutionality of mandatory detention of criminal aliens during removal proceedings, and reached inconsistent conclusions. The Seventh Circuit has rejected a due process challenge to Section 1226(c). *Parra* v. *Perryman*, 172 F.3d 954 (1999). In *Parra*, the alien (who, like respondent, was a lawful permanent resident) conceded that he was removable from the United States because of a criminal conviction, and the Seventh Circuit held that because the alien's "legal right to remain in the United States ha[d] come to an end," he had no protected liberty interest in remaining at large in this country that could outweigh the government's interest in detention to ensure removal. *Id.* at 958. The Ninth and Tenth Circuits, by contrast, have held Section 1226(c) unconstitutional as applied to lawful permanent resident aliens, but the law's constitutionality as applied to other

groups of criminal aliens in those circuits is uncertain. See App., *infra*, 5a ("We are not prepared to hold * * * that detention under the statute would be unconstitutional in all of its possible applications."); *Hoang* v. *Comfort*, No. 01-1136, 2002 WL 339348, at *11 (10th Cir. Mar. 5, 2002) (holding Section 1226(c) unconstitutional "as applied to the petitioners as lawful permanent resident aliens"). In the Third Circuit, Section 1226(c) has been held unconstitutional as applied to a lawful permanent resident alien (in *Patel* v. *Zemski*, 275 F.3d 299 (2001)) and an illegal alien (in *Radoncic*).

The Third, Ninth, and Tenth Circuits have expressly rejected the Seventh Circuit's reasoning in *Parra*. See *Patel*, 275 F.3d at 313-314; App., *infra*, 26a-27a; *Hoang*, 2002 WL 339348, at *6. Review is warranted to resolve this circuit conflict about the constitutionality of Section 1226(c).

Resolution of the constitutional issue by this Court is all the more warranted because the enforceability of Section 1226(c) has great practical importance for the administration of the immigration laws. Since IIRIRA's enactment in 1996, the INS has detained more than 75,000 criminal aliens pursuant to the requirements of Section 1226(c). Each week, moreover, there are hundreds of new INS detentions under Section 1226(c) as new removal proceedings against criminal aliens trigger mandatory detention. Because of the broadly recurring nature of the due process challenges to Section 1226(c), both the Executive Branch and the Judicial Branch have a strong interest in resolving this issue as soon as possible.

2. The decision of the court of appeals in this case is incorrect. The court of appeals substituted its own judgment for Congress's determinations regarding the importance of detaining criminal aliens during removal

proceedings. Those aliens have been convicted of particular crimes that Congress specifically enumerated, and they have enjoyed full due process protections in connection with those convictions. Thus, criminal aliens have *already* been accorded the opportunity for an individualized hearing on the essential predicate for their detention under Section 1226(c).

a. The court of appeals relied heavily on *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001). App., *infra*, 9a-12a; see *id.* at 23a ("It is sufficient for our purposes to rely on the reasoning of the majority in *Zadvydas*."). *Zadvydas*, however, does not suggest that Section 1226(c) is constitutionally infirm. In *Zadvydas*, the critical fact—which the Court found to raise a sufficient constitutional doubt to warrant an implied temporal limitation on the detention of lawful permanent resident aliens who were subject to a final order of removal —was that the INA otherwise would have authorized "indefinite, perhaps permanent, detention." 121 S. Ct. at 2503; see, *e.g.*, *id.* at 2498 ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem."). The Court removed the constitutional doubt that it had identified by construing 8 U.S.C. 1231(a) as authorizing detention of such aliens only as long as removal is reasonably foreseeable. *Id.* at 2503. In Section 1226(c), consistent with the holding of *Zadvydas*, Congress itself specified an "obvious termination point" (*ibid.*) for detention, because the provision applies only during the alien's administrative removal proceedings. Detention of an alien who is under a final order of removal is instead governed by 8 U.S.C. 1231(a), the provision this Court interpreted in *Zadvydas*. Because Congress itself established a reasonable and defined limitation on mandatory detention under Section 1226(c), the central constitutional con-

cern underlying the holding of *Zadvydas* has no application here.[7]

b. The court of appeals also reasoned (App., *infra*, 13a-23a) that an individualized hearing to assess a criminal alien's flight risk and danger to the community would not compromise accomplishment of Congress's objectives in enacting Section 1226(c). That reasoning is incorrect.

Section 1226(c) was enacted in direct response to the failure of earlier immigration provisions that provided for the sort of individualized hearings that the court of appeals required here. See 8 U.S.C. 1252(a)(2) (1994) (mandating detention of aggravated felons except upon demonstration by alien of lawful entry and no threat to community or flight risk); 8 U.S.C. 1226(e), 1253(g) (1994) (mandating detention of aggravated felons who sought admission to United States except when alien's home country refused to repatriate and alien demonstrated absence of threat to community). The Senate Governmental Affairs Committee, for example, found that criminal aliens "often fail[ed] to appear for their actual deportation" and that in New York during fiscal year 1993, 88% of all aliens who were ordered to surrender for deportation absconded. S. Rep. No. 48, 104th Cong., 1st Sess. 24 (1995); see also *id.* at 23 (as of 1992, nearly 11,000 aliens convicted of aggravated felonies had failed to appear for their deportation hearings). The House Judiciary Committee similarly

[7] For the same reason, the court of appeals was incorrect when it suggested (App., *infra*, 22a-23a) that the fact that Congress gave the Attorney General discretion to hold bail hearings for aliens who cannot be removed from the United States within the 90-day removal period—and whose removability therefore may be in serious doubt—undermines the constitutionality of mandatory detention during the pendency of removal proceedings.

determined that "[t]he government's attempts to deport those aliens committing the most serious crimes has proved to be ineffective." H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995). That committee further found that "an important subset of the annual growth in the number of illegal aliens—as many as 50,000 or more—consists of those who have been ordered deported, but are not actually removed"; that criminal aliens released on bond had "disappear[ed] into the general population of illegal aliens"; and that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens through out the course of their deportation proceedings." H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 119, 123 (1996).

The court of appeals observed (App., *infra*, 13a-15a) that Section 1226(c) requires detention of some criminal aliens who, although believed by the INS to be removable, might ultimately obtain relief from removal. The Court did not conclude, however, that respondent is likely to obtain such relief. And, in any event, the *possibility* of remaining lawfully in the United States does not eliminate a criminal alien's incentive to flee proceedings that most often lead to a final order of removal. As the data compiled by Congress show, thousands and thousands of aliens previously failed to appear for their removal proceedings, notwithstanding theoretical statutory opportunities for avoiding removal. The very purpose of removal proceedings, moreover, is to identify those aliens who have a statutory right to remain in the country or who qualify for discretionary relief from removal. It would be difficult and administratively cumbersome to identify such persons in advance of full removal proceedings.

Congress, having compiled a factual record demonstrating the high flight risk of criminal aliens and other removable aliens, determined that removal of aggravated felons and other specified criminal aliens could not reliably be accomplished without mandatory detention. That judgment, which directly implicates the "fundamental" sovereign power to expel and exclude aliens, deserves judicial deference. See *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (quoting *Shaughnessy* v. *Mezei*, 345 U.S. 206, 210 (1953)); see *Plyler* v. *Doe*, 457 U.S. 202, 225 (1982) ("Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field.").

The court of appeals erroneously dismissed, as unsupportive of Congress's determination, the conclusion of the Justice Department's *Detention Report* that "[d]etention is key to effective deportation." App., *infra*, 16a (quoting *Detention Report*). In that report, the Department's Office of the Inspector General calculated, based on a sample of 1058 cases in fiscal year 1994, that only 11% of nondetained aliens with final orders of deportation were successfully removed, whereas the INS was able to remove almost 94% of the detained aliens who were ordered deported. *Detention Report* 1, 4, 6.[8] The court of appeals found it "obvious" that aliens released on bond were counted as "detained" aliens in the report, and did not contribute to the 89% "skip rate." App., *infra*, 15a-16a & n.1. The notion that the Inspector General would count aliens who were

[8] In *Parra*, the Seventh Circuit relied on the same Justice Department study. See 172 F.3d at 956 (citing *Federal Register* reference to *Detention Report*).

released from custody on bond as "detained" is, to say the least, not "obvious." And in fact, contrary to the court of appeals' belief, the report confirms (in a portion not cited by the court of appeals) that aliens released on bond rather than held in detention were counted in the category of "nondetained" aliens, who had an overall 11% removal rate. See *Detention Report* 8 ("[INS] staff cited *detained aliens and aliens released on bond* as their priority cases. *Other nondetained alien cases* were worked as time allowed.") (emphasis added). The court relied, as support for its linguistically unlikely reading, on the report's statement that two detained aliens who were released on bond absconded. App., *infra*, 16a n.1. We have been informed by the Office of the Inspector General, however, that—consistent with the language in its report—it in fact counted aliens who were released on bond while awaiting removal within the "nondetained" category. The two aliens cited by the court of appeals were held in INS detention upon the entry of a final order of deportation and were only later released on bond. The court of appeals therefore erred in disregarding the *Detention Report*'s compelling illustration of the problem that Congress sought to address through Section 1226(c).

c. The court of appeals also questioned Congress's selection of the particular crimes that trigger mandatory detention, expressing the view that some of the crimes covered as aggravated felonies (see 8 U.S.C. 1101(a)(43)) do not indicate an "especially serious danger to the public" and that, in any event, a criminal conviction "can be unreliable evidence of dangerousness." App., *infra*, 20a. The court of appeals appears to have concluded categorically that only an alien's conviction of a violent crime that endangers "physical safety" could support detention. *Id.* at 4a.

Again, the Ninth Circuit straightforwardly substituted its own policy judgment for the considered conclusion of the political Branches. When considering immigration reforms, the 104th Congress carefully assessed the list of crimes that triggered removal and mandatory detention of criminal aliens. See, *e.g.*, H.R. Rep. No. 22, *supra*, at 7-8. Whereas the court of appeals was of the view that crimes such as trafficking in stolen vehicles, counterfeiting, and obstructing justice do not pose a particular threat to the public, Congress identified them as crimes "often committed by persons involved in organized immigration crime," which presents a particular concern because it victimizes vulnerable immigrants and leads to involuntary servitude, prostitution, and other illegal activities, and even death. *Id.* at 7.

d. The court of appeals' rejection of Congress's legislative determinations concerning the risk of flight and danger to the community cannot be reconciled with this Court's recognition of Congress's special authority over immigration. See, *e.g.*, *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). Nor is it consistent with this Court's reasoning when the Court has rejected due process challenges to detention under other provisions of the immigration laws. See, *e.g.*, *Reno* v. *Flores*, 507 U.S. 292, 305-306 (1993) (upholding INS regulation limiting release of juvenile alien detainees); *Carlson* v. *Landon*, 342 U.S. 524, 537-542 (1952) (upholding detention of permanent resident aliens based on evidence of Communist Party membership); *Wong Wing* v. *United States*, 163 U.S. 228, 235 (1896) ("Proceedings to exclude or expel [aliens] would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation.").

3. As explained in the petition in *Radoncic* (at 19-22), review is warranted in both *Radoncic* and this case, to better ensure a definitive resolution of the constitutionality of Section 1226(c). Granting certiorari in this case (which involves a lawful permanent resident) as well as in *Radoncic* (which involves an illegal alien unlawfully present in the United States, who is entitled to lesser due process protection in this context[9]) will enable the Court to address the constitutionality of Section 1226(c) in a wider range of applications and thereby reduce the likelihood of future disagreements in the lower courts about the constitutionality of applying Section 1226(c) to particular classes of aliens.

Granting review in two cases, rather than just one, also is appropriate in light of the unusual potential for mootness in habeas corpus challenges to Section 1226(c). See *Radoncic* Pet. at 20-21. This case is not moot, because respondent's administrative removal proceeding is pending. It also appears unlikely that respondent's removal proceedings—which were continued at respondent's request, see p. 7, & n.3, *supra*—will be completed before the Court renders a decision if it grants review.

The Court therefore should grant the certiorari petition in this case as well as the pending petition in *Radoncic* (No. 01-1459), and the two cases either should be set for oral argument in tandem with one another or should be consolidated for oral argument.

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[9] See *Landon* v. *Plasencia*, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *Johnson* v. *Eisentrager*, 339 U.S. 763, 770 (1950) ("The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.").

CONCLUSION

The petition for a writ of certiorari should be granted, and the case should be set for oral argument in tandem with, or be consolidated for oral argument with, *Elwood* v. *Radoncic*, petition for cert. pending, No. 01-1459 (filed Apr. 4, 2002).

Respectfully submitted.

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APRIL 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17373

HYUNG JOON KIM, PETITIONER-APPELLEE

v.

JAMES W. ZIGLAR, COMMISSIONER;
JOHN ASHCROFT,* ATTORNEY GENERAL,
RESPONDENTS-APPELLANTS

Appeal from the United States District Court for the Northern District of California; Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted Feb. 12, 2001
Filed Jan. 9, 2002

Before: HUG, NOONAN, and W. FLETCHER, Circuit Judges.

WILLIAM A. FLETCHER, Circuit Judge:

We consider a constitutional challenge to § 236(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1226(c), which requires that the Attorney General take into custody, and detain without bail, certain categories of aliens during the pendency of removal proceedings against them.

* James W. Ziglar, Commissioner, is substituted for his predecessor, Thomas Schiltgen, and John Ashcroft, Attorney General, is substituted for his predecessor, Janet Reno, Fed. R. App. P. 43(c)(2).

Petitioner Hyung Joon Kim, a citizen of Korea, came to the United States in 1984 at the age of six. Two years later, at the age of eight, he became a lawful permanent resident alien. In July 1996, at the age of 18, he was convicted of first degree burglary in California state court. In August 1997, he was convicted in California state court of petty theft with priors, and was sentenced to three years imprisonment. The day after his release from state custody, the Immigration and Naturalization Service ("INS") detained Kim pursuant to 8 U.S.C. § 1226(c)(1)(B), on the ground that his second conviction qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43), which in turn made him removable under 8 U.S.C. § 1227(a)(2)(A)(iii).

On May 17, 1999, after more than three months in INS custody, Kim filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, arguing that the no-bail provision of § 1226(c) violates the Due Process Clause of the Fifth Amendment. On August 10, 1999, after Kim had been in custody for six months, the district court held § 1226(c) unconstitutional on its face and ordered the INS to hold a bail hearing to determine Kim's risk of flight and dangerousness. In lieu of holding a bail hearing, the INS released Kim on a $5,000 bond. A hearing before an Immigration Judge ("IJ") to determine Kim's removability is scheduled for March 2002. The INS appeals from the judgment of the district court.

Although Kim is no longer in custody, the case continues to present a live controversy because the INS states that it will take Kim into custody and hold him without bail if we reverse. The district court had jurisdiction pursuant to 28 U.S.C. § 2241. *See INS v. St. Cyr*, 533 U.S. 289, 121 S. Ct. 2271, 2278, 150 L.Ed.2d 347 (2001). We have jurisdiction under 28 U.S.C. § 1291.

We do not hold in this case that the unavailability of bail under § 1226(c) is unconstitutional on its face. We do hold, however, that it is unconstitutional as applied to lawful permanent resident aliens.

I

The INS detained Kim pursuant to 8 U.S.C. § 1226(c), a provision passed as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009. The Section as a whole is entitled "Detention of criminal aliens." Section 1226(c)(1) provides, in relevant part,

> The Attorney General shall take into custody any alien who—
>
> (A) is inadmissible by reason of having committed any offense covered in Section 1182(a)(2) of this title,
>
> (B) *is deportable by reason of having committed any offense covered in Section 1227(a)(2)(A)(ii), (A)(iii),* (B), (C), or (D) of this title,
>
> (C) is deportable under section 1227(a)(2)(A)(i) of this title on the basis of an offense for which the alien has been sentence[d] to a term of imprisonment of at least 1 year, or
>
> (D) is inadmissible under section 1182(a)(3)(B) of this title or deportable under section 1227(a)(4)(B) of this title,

> when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(Emphasis added.)

Three things are notable about § 1226(c)(1). First, no bail is allowed during the pendency of removal proceedings. This is true even for aliens who are not flight risks and do not pose any threat to the public. Second, a wide range of past conduct triggers removal proceedings and detention without bail. Much of that conduct is non-violent and poses little threat to the physical safety of the public. *See* discussion in Part V.B, *infra*. Third, the no-bail provision of § 1226(c)(1) contrasts with the availability of bail under § 1231(a)(6). Section 1226(c)(1) prohibits bail for aliens during the pendency of their removal proceedings—that is, during the period before determination of removability and before entry of any removal order. By contrast, § 1231(a)(6) allows bail for aliens against whom a final removal order has been entered, once 90 days have elapsed since the entry of the order. *See* discussion in Part VI, *infra*.

Only one category of alien is exempt from the no-bail requirement of § 1226(c). Section 1226(c)(2) provides for release of government witnesses or those assisting government investigations. Kim has not served as a government witness or assisted in any government investigation, and is therefore not entitled to release from detention under this provision.

II

The district court sustained a facial constitutional challenge to § 1226(c). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). We recently reaffirmed the vitality of the *Salerno* standard outside of First Amendment cases. *See S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 467 (9th Cir. 2001) ("While we have held that [*Planned Parenthood v.*] *Casey* [505 U.S. 833, 112 S. Ct. 2791, 120 L.Ed.2d 674 (1992)] overruled *Salerno* in the context of facial challenges to abortion statutes, we will not reject *Salerno* in other contexts until a majority of the Supreme Court clearly directs us to do so.") (citation and quotation marks omitted).

We do not affirm the district court's facial invalidation of § 1226(c). We are not prepared to hold, on the record in this case, that detention under the statute would be unconstitutional in all of its possible applications. For example, the statute also applies to aliens who have not "entered" the United States. In *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (en banc), we wrote that "[b]ecause excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows." *Id.* at 1450. The Supreme Court noted the importance of the distinction between aliens who have "entered" and those who have not in *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2500,

150 L.Ed.2d 653 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law."). Further, the status of an alien who has been paroled into the United States pursuant to 8 U.S.C. § 1182(d)(5) is the same as that of an alien detained at the border, such an alien has not "entered" the United States. *See* 8 U.S.C. § 1182(d)(5)(A) ("such parole of such alien shall not be regarded as an admission of the alien"); *Leng May Ma v. Barber*, 357 U.S. 185, 188-90, 78 S. Ct. 1072, 2 L.Ed.2d 1246 (1958); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 961 n.4 (9th Cir.1991) ("[A]n excludable alien may be paroled into the United States, in which case the law treats him as if he never entered the country and 'exclusion' remains the procedure for removing him."). The detention of aliens who have not "entered" the United States is not before us, and we are not prepared to address, on the record compiled in this case, whether such detention is unconstitutional.

We therefore stop short of affirming the district court's holding that § 1226(c) is facially unconstitutional. However, "we may affirm on any basis supported by the record." *Saltarelli v. Bob Baker Group Medical Trust*, 35 F.3d 382, 387 (9th Cir. 1994). In the present appeal, there is evidence in the record sufficient to permit us to consider this case as an as-applied challenge. We affirm the district court's grant of habeas corpus relief to petitioner Kim on the ground that the statute is unconstitutional as applied to him in his status as a lawful permanent resident alien who has entered the United States.

III

Lawful permanent resident aliens are the most favored category of aliens admitted to the United States. They have the most ties to the United States of any category of aliens. About seventy percent of lawful permanent resident aliens are admitted because of family members already in the United States. These family members are either United States citizens or, less commonly, other lawful permanent resident aliens. *See* 8 U.S.C. § 1153(a). The next largest group of lawful permanent resident aliens are highly educated or exceptionally skilled professionals who can contribute in important ways to the educational institutions and economy of the United States. *See* 8 U.S.C. § 1153(b).

Unlike almost all other aliens, lawful permanent resident aliens have the right to apply for United States citizenship. They also have the right, without limitation, to work in the United States. Of particular relevance to this case, lawful permanent resident aliens have the right to reside permanently in the United States. They retain that right until a final administrative order of removal is entered. *See* 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1.1(p).

An administrative order of removal cannot be entered against Kim until, at the earliest, an IJ finds that he is removable. That order will not be final until the Board of Immigration Appeals ("BIA") affirms it, or until the period for seeking BIA review has expired. *See* 8 U.S.C. § 1101(a)(47)(B). Until there is a final removal order, Kim's right to remain in the United States is a matter of law, not grace. *See* 8 C.F.R. § 1.1(p) ("The term *lawfully admitted for permanent residence*

means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. Such status terminates upon entry of a final administrative order of exclusion or deportation.") (emphasis in original); *see also Foroughi v. INS*, 60 F.3d 570, 575 (9th Cir. 1995).

A lawful permanent resident alien has an obvious and important personal interest in his or her own liberty during the pendency of removal proceedings. This interest is important even if the alien is held, at the end of the proceedings, to be removable. A lawful permanent resident alien usually has family members (in most cases, American citizens) who are in the United States and will remain here after the alien is removed. The alien is facing the prospect of long-term separation, and if the no-bail provision is valid he or she will be unable to see his or her son, daughter, husband, wife, father, or mother except in detention facilities during the pendency of the removal proceedings. Such facilities are sometimes at great distances from where the alien lived and where the family members live. Further, many lawful permanent resident aliens own property and/or businesses. Not allowing the alien to wind up his or her affairs in an orderly and advantageous way will work to the disadvantage not only of the alien, but of all those (including American citizens) who depend on the property or business for their economic well-being.

IV

The government argues that the statute is constitutional, even as applied, because decisions about aliens fall within Congress' plenary powers. We do not question the general power that Congress exercises over immigration matters. "Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'" *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 52 L.Ed.2d 50 (1977) (quoting *Shaughnessy v. U.S. Ex Rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L.Ed. 956 (1953)). Indeed, "over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Id.* (quotation marks omitted). Hence aliens are not entitled to the same protections as citizens. "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews v. Diaz*, 426 U.S. 67, 79-80, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976). Further, it has long been recognized that Congress has a general power to detain aliens pursuant to seeking their removal from the United States. *See Wong Wing v. United States*, 163 U.S. 228, 235, 16 S. Ct. 977, 41 L.Ed. 140 (1896) ("We think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid.").

The question before us, however, is more specific. It is whether Congress has adopted a constitutionally permissible means of detention and removal of lawful permanent resident aliens. On this question we take

guidance from *Zadvydas*, in which the Supreme Court last Term addressed detention of aliens under 8 U.S.C. § 1231(a)(6). That section authorizes the Attorney General to detain certain categories of aliens who have been found removable, after the expiration of the 90-day removal period. In *Zadvydas*, aliens who had been found removable were being detained indefinitely under the statute because no country would accept them. They challenged their detention under the Due Process Clause, the same clause upon which Kim relies.

The government made the same plenary powers argument in *Zadvydas* that it makes to us, but the Supreme Court rejected it. The Court did not "deny the right of Congress to remove aliens, to subject them to supervision with conditions when released from detention, or to incarcerate them where appropriate for violations of those conditions." 121 S. Ct. at 2501. But the Court confined the argument by indicating that Congress' power with respect to aliens "is subject to important constitutional limitations." *Id.* The Court drew support from its earlier decision in *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L.Ed.2d 317 (1983), which emphasized that Congress must choose "a constitutionally permissible means of implementing" its plenary power over aliens, and that Congress can exercise that power only if it "does not offend some other constitutional restriction." *Id.* at 941, 103 S. Ct. 2764 (quotation marks omitted).

Zadvydas reaffirmed the principle that aliens are entitled to protection under the Due Process Clause. The Court stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens." 121 S. Ct. at 2500. Even for aliens, "[f]reedom

from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that Clause protects." *Id.* at 2498. The Court noted that it has upheld civil, or "non-punitive," detention only in those limited circumstances where the government has provided a "special justification" outweighing the individual's liberty interest:

> [G]overnment detention violates [the Due Process] Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or, *in certain special and narrow non-punitive circumstances*, where a *special justification*, such as harm-threatening mental illness, outweighs the individual's constitutionally protected interest in avoiding physical restraint.

Id. at 2498-99 (quotation marks, alterations, and citations omitted; emphasis altered from original).

The Court in *Zadvydas* concluded that the statute before it was non-punitive and regulatory rather than criminal, and analyzed the detention provision to determine whether the government had provided a "special justification" that would justify detention. The government argued that detention was necessary to prevent removable aliens from fleeing and to prevent danger to the community. *Id.* at 2499. The *Zadvydas* Court rejected the government's arguments, concluding that "[t]here is no sufficiently strong special justification here for indefinite civil detention." *Id.* To avoid the constitutional problems that would have been posed by the indefinite detention of removable aliens, the Court held that detention under § 1231(a)(6) is subject to a "reasonable time" limitation. *Id.* at 2495.

See also Ma v. Ashcroft, 257 F.3d 1095 (9th Cir. 2001) (reinstated opinion following remand) ("*Ma II*").

V

In this case, as in *Zadvydas*, it is clear that the statute authorizing detention is civil and regulatory, not criminal or punitive. The detention authorized by § 1226(c) is ostensibly designed to ensure that aliens are removed, and it is established law that removal proceedings are civil. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038, 104 S. Ct. 3479, 82 L.Ed.2d 778 (1984). Following *Zadvydas*, we thus must analyze § 1226(c) to determine whether the government has provided a sufficiently strong "special justification" to justify civil detention of a lawful permanent resident alien.

The government advances five justifications for no-bail civil detention under § 1226(c): (1) preventing criminal aliens from absconding so that they can be expeditiously removed as required by law, (2) protecting public safety from the presence of potentially dangerous criminal aliens, (3) making the removal of criminal aliens a top priority of immigration enforcement, (4) correcting the failure of the prior laws which permitted release on bond, and (5) repairing damage to America's immigration system.

The last three justifications are so general that they amount to little more than saying that the "justification" of the statute is to make deportation a priority and to make things better. The two principal justifications are those listed first: (1) preventing criminal aliens from fleeing during removal proceedings; and (2) protecting the public from potentially dangerous aliens. It was these two justifications that the Supreme Court

considered—and found insufficient—in *Zadvydas*. We treat them in order.

A. Risk of flight

The government argues that it must detain aliens such as Kim to prevent them from fleeing pending the completion of their removal proceedings. The government contends that under IIRIRA, unlike under the prior statute, removal is virtually certain once removal proceedings have begun. Therefore, argues the government, an alien in removal proceedings has little hope of avoiding removal and correspondingly little incentive to appear for his removal hearing. *See also Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("Before the IIRIRA[,] bail was available . . . as a corollary to the possibility of discretionary relief from deportation; now that this possibility is so remote, so too is any reason for release pending removal."). The government thus contends that without no-bail detention, it will be unable to ensure that removable aliens will actually be removed.

We are not persuaded. First, IIRIRA did not eliminate all avenues of relief for persons subject to § 1226(c). An alien convicted of an aggravated felony may be eligible for withholding of removal if (1) removal to a particular country might threaten the alien's life or freedom because of the alien's race, religion, nationality, membership in a particular social group, or political opinion, and (2) the alien has not participated in persecution, has not committed a particularly serious crime, and does not pose a danger to the United States. *See* 8 U.S.C. § 1231(b)(3)(A), (B). An alien may also receive relief under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment. *See Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001).

Second, the Supreme Court's recent decision in *St. Cyr*, rendered since the government's briefs were filed, upheld habeas corpus relief for aliens subject to removal because of a prior conviction for an aggravated felony conviction. 121 S. Ct. at 2293. The Court held that discretionary relief under former INA § 212(c) was preserved for a large category of aliens removable because of an aggravated felony. The Court held that "§ 212(c) relief remains available for aliens . . . whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea under the law then in effect." *Id.* The preservation of § 212(c) relief is particularly important in providing a defense to removal. The Court noted that 90% of convictions are through guilty pleas, *see id.* at 2292 n. 51, and that in the past more than 50% of the applications for § 212(c) relief were granted. *Id.* at 2277 n. 5. The Court observed, further, that because IIRIRA expanded the definition of aggravated felony to include "more minor crimes which may have been committed many years ago," it is likely "that an increased percentage of applicants will meet the stated criteria for § 212(c) relief." *Id.* at n. 6.

Third, some aliens detained under the statute may be able to demonstrate that the conviction for which the INS seeks to remove them was not an aggravated felony. At the very least, the broad and somewhat uncertain sweep of the statutory definitions of aggravated felony ensures that there will be many disputes on the margins. We have held, against the contention

of the government, that certain convictions do not qualify as aggravated felony convictions. *See, e.g., Chowdhury v. INS*, 249 F.3d 970 (9th Cir. 2001) (holding that conviction for laundering $1,300 was not an aggravated felony); *Sareang Ye v. INS*, 214 F.3d 1128 (9th Cir. 2000) (holding that state-law offenses of vehicle burglary did not make alien eligible for removal because they were neither "burglaries" nor "crimes of violence" under the INA).

In addition to relying on increased flight risk allegedly resulting from the passage of IIRIRA, the government relies on a 1997 report, prepared by the Department of Justice Office of the Inspector General. *See* Inspection Report, "Immigration and Naturalization Service Deportation of Aliens After Final Orders Have Been Issued," Rep. No. I-96-03 (March 1996), *available at* http://www.usdoj.gov/oig/i9603/i9603.htm ("Report"). The Report concluded that 89% of "nondetained" aliens subject to a final removal order failed to appear for removal when ordered to do so. *See id.* at 8-9. The government relies on the 89% "skip rate" to argue that no-bail detention under § 1226(c) is necessary to ensure appearance at the removal hearing.

The Report is based on a study of the files of 1,058 randomly selected aliens who were issued final deportation orders. The files were divided into two categories, "detained" and "nondetained" aliens. Of the "detained aliens," 94% were "successfully deported." *Id.* at 6. Most of the remaining 6% were not "successfully deported" for innocent reasons. For example, half were not deported for political or humanitarian reasons. *Id.* Of the "nondetained aliens," 89% fled to avoid deportation. *Id.* at 11-12.

The government makes a fundamental factual error in relying on the 89% figure in the Report. That figure applies to "nondetained aliens." Aliens released on bail were "detained" rather than "nondetained" as those categories are defined in the Report. *Id.* at 6.[1] The 89% figure is thus inapplicable to aliens released on bail.

The Report concluded, "Based on the results of our sample of 1,058 cases, it is clear that most of the aliens actually deported were detained, and few of the nondetained aliens were deported. *Detention is key to effective deportation.*" *Id.* at 14 (emphasis added). When the Report thus recommended "detention" as "key to effective deportation," it recommended precisely what Kim seeks and the government opposes.

B. Danger to the public

We next consider the government's interest in protecting the public from dangerous aliens released

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[1] In the section entitled "Removal of Detained Aliens," the Report states:

> We reviewed 402 *detained alien case files.* INS deported 376, or almost 94 percent of all the aliens. The 26 aliens not deported included 13 of nationalities that could not be deported for political or humanitarian reasons, 4 for whom INS was unable to obtain travel documents, 2 pending travel arrangements, 2 who had been granted administrative relief, *2 who had been released on bond and then absconded,* 1 with a Federal appeal pending, 1 pending prosecution for illegal entry after a previous deportation, and 1 who had been indicted for murder and turned over to the local police department.

Id. at 6 (emphasis added). Since those "released on bond" were counted among the "detained alien case files," it is obvious that such aliens were categorized as "detained aliens."

pending removal proceedings. Existing Supreme Court precedents establish that civil detention will be upheld only when it is narrowly tailored to people who pose an unusual and well-defined danger to the public. In such cases the government has had the burden of proving that the particular individual meets the criteria for detention.

In *Salerno,* 481 U.S. 739, 747, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987), the Supreme Court upheld the constitutionality of pre-trial detention of people accused of "the most serious of crimes," namely "crimes of violence, offenses for which the sentence is life imprisonment or death, serious drug offenses, or certain repeat offenders." 481 U.S. at 747, 107 S. Ct. 2095. But *Salerno* required the government to do more than merely charge a person with a serious crime: "In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750, 107 S. Ct. 2095.

In *Kansas v. Hendricks,* 521 U.S. 346, 117 S. Ct. 2072, 138 L.Ed.2d 501 (1997), the Supreme Court upheld Kansas' "Sexually Violent Predator Act," which permitted civil detention of people with a "mental abnormality" or "personality disorder" that rendered them likely to commit "predatory acts of sexual violence." *Id.* at 352, 117 S. Ct. 2072. Even though the statute's application was confined to "a small segment of particularly dangerous individuals," *id.* at 368, 117 S. Ct. 2072, the Court cautioned that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involun-

tary commitment." *Id.* at 358, 117 S. Ct. 2072. The Kansas statute required an additional finding of mental illness, thus further "limit[ing] involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control." *Id.* The combination of the dangerousness finding and the mental illness finding—both of which the government had to prove beyond a reasonable doubt—rendered the detention permissible. *See also Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979) (requiring the state to prove by clear and convincing evidence that a person is mentally ill and requires hospitalization to protect himself and others before commitment to a mental institution satisfies due process).

In *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L.Ed.2d 437 (1992), the Supreme Court struck down a Louisiana statute under which a defendant found not guilty by reason of insanity was civilly detained until the defendant proved that he or she was not dangerous. The Court observed that "[u]nlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." *Id.* at 81, 112 S. Ct. 1780. The scheme did not require the government to find that the person to be detained was presently mentally ill. And it did not carefully restrict its application to the most dangerous, in part as a result of the fact that "the statute place[d] the burden on the detainee to prove that he is not dangerous." *Id.* at 82, 112 S. Ct. 1780.

The civil detention schemes upheld by the Supreme Court in *Salerno* and *Hendricks* contrast sharply with pre-adjudication civil detention under § 1226(c). The

critical difference is that § 1226(c) contains no provision for an individualized determination of dangerousness. *Carlson v. Landon*, 342 U.S. 524, 72 S. Ct. 525, 96 L.Ed. 547 (1952), on which the government places great weight, is not to the contrary. In *Carlson*, the petitioners were detained aliens who were members of the Communist party. The detention statute in question, enacted during the Cold War, deemed members of the Communist party a threat to national security because of the Communist party's advocacy of violent revolution. The Court upheld a rebuttable presumption of detention for members of the Communist party. It wrote, "Detention is necessarily a part of th[e] deportation procedure. Otherwise aliens arrested for deportation would have opportunities to hurt the United States during the pendency of deportation proceedings." *Id.* at 538, 117 S. Ct. 2072.

But in *Carlson* there was only a presumption, not a certainty, of detention, and the possibility of discretionary release pending the proceedings was central to the Court's approval of the detention scheme: "Of course purpose to injure could not be imputed generally to all aliens subject to deportation, so discretion was placed by the 1950 Act in the Attorney General. . . ." *Id.* Moreover, the Court noted in *Carlson* that detention without bail was exceptional: "There is no evidence or contention that all persons arrested as deportable . . . for Communist membership are denied bail. In fact, a report filed with this Court . . . at our request shows allowance of bail in the large majority of cases." *Id.* at 541-42, 72 S. Ct. 525. By contrast, under § 1226(c), bail is simply never allowed.

Finally, the government argues that § 1226(c) "relies on actual egregious crimes or conduct of convicted criminals as conclusive evidence that the alien is a 'public menace.'" This argument is insufficient to justify a blanket denial of bail, for "aggravated felonies," as defined in the statute, are not all "egregious"; nor do they "conclusively" establish the people who have committed them are menaces to the public.

Recent decisions of this circuit demonstrate the wide range of crimes that meet the statutory definition of aggravated felony. *See, e.g., United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) (state felon in possession); *Park v. INS*, 252 F.3d 1018 (9th Cir. 2001) (involuntary manslaughter); *Albillo-Figueroa v. INS*, 221 F.3d 1070 (9th Cir. 2000) (possession of counterfeit obligations). The definition of aggravated felony includes trafficking in vehicles with altered identification numbers, *see* § 1101(a)(43)(R), and obstructing justice, *see* § 1101(a)(43)(S). Many of these provisions include crimes "relating to" those crimes. *See, e.g.*, § 1101(a)(43)(S) (defining aggravated felony as "an offense relating to obstruction of justice").

Given the range of crimes qualifying as aggravated felonies, the government simply cannot show that § 1226(c) covers only aliens who pose an especially serious danger to the public. Moreover, the fact of a prior conviction alone, without any individualized consideration of the dangerousness of the underlying crime or of the individual's present condition, can be unreliable evidence of dangerousness. Not only may the crime itself have failed to indicate dangerousness; the conviction rendering the alien removable may also have

occurred many years ago, and the alien may have led a law-abiding life since that time.

In sum, we believe that here, too, the government has failed to carry its burden. It has failed to demonstrate that the fact that some aliens may be dangerous justifies civil detention, without bail, of all lawful permanent resident aliens who have been charged with removability.

VI

Outside the four corners of this litigation, the government itself appears to have some doubt about whether no-bail civil detention is a desirable—let alone a necessary—means of dealing with aliens subject to removal proceedings. First, the INS has questioned the wisdom and efficacy of § 1226(c), and has brought to Congress' attention the need for alternative means of ensuring that aliens appear for their removal proceedings. In testimony before the Senate Subcommittee on Immigration, then-Commissioner of the INS Doris Meissner stated that "we are actively exploring alternatives to detention for ensuring that aliens for whom release from custody is appropriate appear for their scheduled hearings." Immigration and Naturalization Oversight Hearings on INS Reform: Detention Issues, Before the Subcomm. on Immigration of the Senate Judiciary Comm., Testimony of INS Commissioner Doris Meissner, *available at* 1998 WL 767401 (F.D.C.H.) (Sep. 16, 1998). Commissioner Meissner also questioned the need for mandatory detention:

> Most of the people for whom Custody is mandatory are people we want removed from the United States. However, in some cases, no purpose is

> served by maintaining the person in custody during the entire process. Accordingly, while we agree that we have discretion to determine whether to pursue removal, we firmly believe that determination should not be dictated by whether the person's custody will be mandated by the statute.

Id. We are reluctant to uphold civil detention impinging on fundamental liberty interests, based on a government policy the need for which the implementing agency has itself questioned.

Second, current law allows bail to aliens who have already been ordered removed once 90 days have passed since the entry of the removal order. *See* 8 U.S.C. § 1231(a)(6) ("An alien ordered removed . . . *may* be detained beyond the [90-day] removal period and, *if released*, shall be subject to the terms of supervision in paragraph (3)." (emphasis added)). If aliens subject to a final order of removal may be released on bail, it makes little sense to deny bail to those who are in removal proceedings but have not yet been ordered removed. The incentives to flee are greater for an alien already ordered removed than for an alien still in removal proceedings. Further, an alien ordered removed is likely to be more dangerous on average than an alien in removal proceedings, since the ground for removal (which may be dangerous conduct) will have been found rather than merely alleged. Yet despite the greater likelihood of flight and dangerousness of aliens already ordered removed, § 1231(a)(6) permits their release on bail. The availability of bail for such aliens thus casts substantial doubt on the argument that aliens merely subject to removal proceedings are so

likely to flee and so dangerous that there is a "special justification" warranting their detention without bail.

VII

Following the approach of the *Zadvydas* majority, we thus conclude that the government has not provided a "special justification" for no-bail civil detention sufficient to overcome a lawful permanent resident alien's liberty interest on an individualized determination of flight risk and dangerousness. It is sufficient for our purposes to rely on the reasoning of the majority in *Zadvydas*. But we note that § 1226(c) also cannot pass constitutional muster under the alternative analysis set forth by Justice Kennedy in that case. *See Zadvydas*, 121 S. Ct. at 2507 (Kennedy, J., dissenting).

Justice Kennedy (joined by Chief Justice Rehnquist) disagreed with the *Zadvydas* majority's attempt to avoid a constitutional problem by adopting a limiting construction of the statute. Justice Kennedy argued that the proper constitutional test was whether the detention was arbitrary or capricious. "[B]oth removable and inadmissible aliens are entitled to be free from detention that is arbitrary or capricious." *Id.* at 2515. He argued that "[i]t is neither arbitrary nor capricious to detain the aliens when necessary to avoid the risk of flight or danger to the community," *id.*, but that such detention requires strict procedural safeguards. He wrote:

> Whether a due process right is denied when removable aliens who are flight risks or dangers to the community are detained turns . . . not on the substantive right to be free, but on whether there are adequate procedures to review their cases,

> allowing persons once subject to detention to show that through rehabilitation, new appreciation of their responsibilities, or under other standards, they no longer present special risks or danger if put at large.

Id.

Justice Kennedy then went through a detailed analysis of the regulations governing post-removal-period detention under § 1231(a)(6). First, he noted that the procedures for finding an alien removable in the first instance require that the government prove its case by clear and convincing evidence, and that the alien be given the right to appeal this decision, to move for reconsideration, or to seek discretionary cancellation of removal. "As a result, aliens . . . do not arrive at their removable status without thorough, substantial procedural safeguards." *Id.* at 2514.

Second, Justice Kennedy pointed to the regulations promulgated under the statute. The majority in *Zadvydas* summarized these provisions:

> [T]he INS District Director will initially review the alien's records to decide whether further detention or release under supervision is warranted after the 90-day removal period expires. 8 C.F.R. § 241.4(c)(1), (h), (k)(1)(i) (2001). If the decision is to detain, then an INS panel will review the matter further, at the expiration of a 3-month period or soon thereafter. § 241.4(k)(2)(ii). And the panel will decide, on the basis of records and a possible personal interview, between still further detention or release under supervision. § 241.4(i). In making this decision, the panel will consider, for example, the alien's disciplinary record, criminal record, mental health reports, evidence of rehabilitation, history of flight, prior immigration history, and favorable factors such as family ties. § 241.4(f). To authorize release, the panel must find that the alien is not likely to be violent, to pose a threat to the community, to flee if released, or to violate the conditions of release § 241.4(e). And the alien must demonstrate "to the satisfaction of the Attorney General" that he will pose no danger or risk of flight. § 241.4(d)(1). If the panel decides against release, it must review the matter again within a year, and can review it earlier if conditions change. §§ 241.4(k)(2)(iii), (v).

Id. at 2495.

Justice Kennedy found these procedures constitutionally sufficient, analogizing them to the procedures involved in parole-eligibility and parole-revocation determinations. *Id.* at 2516. He concluded that "the procedural protection here is real, not illusory," and cited to statistics showing that aliens often succeeded in securing their release. *Id.* Indeed, between February 1999 and mid-November 2000, more than half of the roughly 6,200 aliens who received individualized custody reviews before the end of the 90-day removal period were released. *Id.* (citing 65 Fed. Reg. 80285 (2000)).

The procedures that Justice Kennedy found sufficient to save the statute before the Court in *Zadvydas* from unconstitutionality are entirely absent from § 1226(c). Accordingly, if we were to apply Justice Kennedy's analysis in *Zadvydas* to the facts of this case, we would

conclude that detention under § 1226(c) is arbitrary and capricious and therefore violates due process.

VIII

Two courts of appeals have addressed the constitutionality of no-bail detention under § 1226(c). The Third Circuit has just held, as we do in this case, that detention of a lawful permanent resident alien without an individualized bail hearing is unconstitutional. *See Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001). On the other hand, the Seventh Circuit has upheld the constitutionality of no-bail detention under § 1226(c) for all aliens. *See Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) ("Given the sweeping powers Congress possesses to prescribe the treatment of aliens, the constitutionality of § 1226(c) is ordained.") (citation omitted).

We believe that *Parra* was incorrectly decided. Not only was *Parra* decided prior to *Zadvydas*, in which the Court made clear that the government was required to provide a "special justification" for civil detention of aliens; it was also decided prior to the Court's decision in *St. Cyr*, which preserved § 212(c) discretionary relief and thus made a final removal order less likely for many aliens.

The panel in *Parra* also made two critical mistakes, one legal and one factual. First, *Parra* analyzed the liberty interest of the detained alien based on the erroneous legal assumption that he or she has no right to remain in the United States once removal proceedings have begun. In analyzing an alien's liberty interest in release during removal proceedings, *Parra* stated, "Persons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States[.] . . . The

private interest here is . . . liberty *in the United States* by someone no longer entitled to remain in this country. . . ." 172 F.3d at 958 (emphases in original). This is simply wrong. A lawful permanent resident alien such as Kim has a legal right to remain in the United States until a final removal order is entered against him. *See* discussion in Part III, *supra*.

Second, *Parra* relies on the Inspector General's Report for the proposition that there is an 89% "skip rate" for aliens subject to a final removal order. It wrote, "According to the Department [of Justice], approximately 90% of persons in Parra's situation absconded *when released on bail* before the IIRIRA." *Id.* at 956 (emphasis added). This, too, is simply wrong. As discussed above, the skip rate for "detained aliens" was not 89% (which *Parra* rounds up to 90%). Rather, the skip rate for detained aliens was substantially less than 6%. As pointed out above, release on bail was included in the Report's definition of "detention," and the Report recommended "detention" thus defined as the "key to effective deportation." *See* discussion in Part V.A, *supra*.

IX

We must consider whether we can adopt a construction of § 1226(c) that would allow us to avoid the constitutional question presented in this case. "[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems." *St. Cyr*, 121 S. Ct. at 2279 (citation omitted) (quoting *Crowell v. Benson*, 285 U.S. 22, 62, 52 S. Ct. 285, 76 L.Ed. 598 (1932)). *See also Ma II*, 257

F.3d at 1106 ("The Supreme Court has long held that courts should interpret statutes in a manner that avoids deciding substantial constitutional questions."). Kim argues that such a construction is possible, focusing on the "is deportable" language in § 1226(c). Kim urges us to construe "is deportable" to mean that the alien is subject to a final order of removal. A final order is not entered until, at a minimum, an IJ enters a final order finding the alien removable. Under this construction, the Attorney General would be without authority to detain aliens subject to removal proceedings under § 1226(c) because such aliens are not yet subject to final orders of removal.

In construing a statute to avoid constitutional problems, we cannot adopt a "strained construction of the statute," *Ma v. Reno*, 208 F.3d 815, 827 (9th Cir. 2000), *modified and reinstated by Ma II*; nor can we adopt a saving construction that is "plainly contrary to the intent of Congress." *United States v. X-Citement Video*, 513 U.S. 64, 78, 115 S. Ct. 464, 130 L.Ed.2d 372 (1994). "In performing our constitutional narrowing function, we may come up with any interpretation we have reason to believe Congress would not have rejected." *Ma II*, 257 F.3d at 1111 (citation and quotation marks omitted).

Considered in isolation, the "is deportable" language could mean "subject to a final order of removal entered by an IJ." But when considered in the context of the entire statute, such a construction is not available. The rest of the statute makes clear that the alien is subject to no-bail detention—that is, "is deportable"—as soon as he or she is released from custody for the criminal conviction that constitutes the aggravated felony providing the basis for removal. *See* 8 U.S.C. § 1226(c)(1) ("The Attorney General shall take into custody any alien . . . *when the alien is released*, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.") (emphasis added). We are thus not at liberty to interpret the statute as postponing the application of the no-bail provision until after the completion of the alien's removal proceeding before the IJ.

X

In construing § 1321(a)(6) not to allow indefinite civil detention of aliens, the Supreme Court in *Zadvydas* was careful to state:

> [W]e leave no "unprotected spot in the Nation's armor." Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventative detention and for heightened deference to the judgments of the political branches with respect to matters of national security.

121 S. Ct. at 2502 (citation omitted). After the horrific events of September 11, 2001, the Court's statement takes on special significance.

No one contends that Kim is a terrorist. He was brought to the United States from Korea when he was six years old and became a lawful permanent resident alien when he was eight. He committed rather ordinary crimes in the state of California, and those crimes are the basis for the removal proceedings now pending against him.

No responsible court will leave an "unprotected spot in the Nation's armor," and our decision does not do so. We do not hold that a lawful permanent resident alien in removal proceedings has an absolute right to bail. We hold only that such an alien has a right to an individualized determination of a right to bail, tailored to his or her particular circumstances.

We must remember that our "Nation's armor" includes our Constitution, the central text of our civic faith. It is the foundation of everything that makes our country's system of laws and freedoms worth defending. As a lawful permanent resident, Kim is entitled to the individualized determination and fair procedures guaranteed by the Due Process Clause of the Fifth Amendment.

Conclusion

We affirm the order of the district court requiring the INS to conduct a bail hearing for Kim. However, our rationale does not go as far as the district court's. We do not hold that § 1226(c) is unconstitutional on its face. Rather, we hold only that it is unconstitutional as applied to Kim in his status as a lawful permanent resident alien. We hold that the INS may detain a lawful permanent resident alien prior to removal proceedings, but that due process requires that it hold a bail hearing with reasonable promptness to determine whether the alien is a flight risk or a danger to the community.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 99-2257 SI

HYUNG JOON KIM, PETITIONER

v.

THOMAS SCHILTGEN AND JANET RENO, RESPONDENTS

[Filed: Aug. 11, 1999]

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

On August 6, 1999, the Court heard argument on Hyung Joon Kim's petition for a writ of habeas corpus challenging the constitutionality of the mandatory detention provisions of INA § 236(c). Having carefully considered the arguments of the parties and the papers submitted, the Court GRANTS Kim's petition and orders the government to provide a bail hearing as specified herein. To the extent that Kim seeks immediate release from INS detention during the pendancy of his deportation proceedings, Kim's petition is DENIED.

BACKGROUND

Petitioner Hyung J. Kim ("Kim"), a citizen of Korea, is confined by the federal government pending the conclusion of his removal proceedings. Kim was born in

Seoul, Korea, on December 10, 1977, and entered the United States as a non-immigrant on March 10, 1984 at the age of six. He became a legal permanent resident of the United States on March 26, 1986 at age 8. He is now twenty-one, and has lived in the United States for fifteen years.

On July 8, 1996, at age 18, Kim was convicted in California state court of first degree burglary. On April 23, 1997, at age 19, he was convicted in California state court of petty theft with priors, and on October 8, 1997, he was sentenced to three years in state prison. His estimated release date was February 1, 1999.

On December 16, 1998, the Immigration and Naturalization Service ("INS") issued a notice to appear, placing Kim in removal proceedings under the Immigration and Nationality Act ("INA" or "the Act"). The notice to appear charged Kim with deportability pursuant to § 237(a)(2)(A)(iii) of the INA, as an alien convicted of an aggravated felony as defined in § 101(a) (43) of the Act. 8 U.S.C. § 1227(a)(2)(A)(iii). Under this section, theft offenses for which the sentence is to at least one year imprisonment are defined as aggravated felonies. Kim's conviction for petty theft with priors, for which he received a three-year sentence, thus met the definition of an aggravated felony.

At the same time the notice to appear was issued, the INS determined that Kim would be held without a bond hearing, because the INA prohibited his release from custody. The notice to appear was served on Kim on February 2, 1999, after he had completed his prison sentence, and Kim was accordingly taken into INS custody. Kim remains a legal permanent resident until a final finding of his deportability is made.

Section 236(c)(1) of the INA, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, states that the Attorney General "shall take into custody any alien who" is removable as an aggravated felon under INA § 1227(a)(2)(A)(iii). This section thus mandates the detention of criminal aliens during their removal proceedings. A person taken into custody under § 236(c)(1) may only be released if the person is a participant in the federal witness protection program and can show that he is not a flight risk or a danger to the community. As Kim is not a member of the witness protection program, § 236(c)(1) results in his mandatory detention pending his deportation proceedings. Because under the statute he cannot be released on bail, he has not been granted a bail hearing.

Kim filed this petition for a writ of habeas corpus on May 17, 1999. Kim asserts that by mandating his detention without a bail hearing, § 236(c)(1) violates his constitutional right to due process as guaranteed by the Fifth Amendment to the United States Constitution. Kim seeks a declaration of this Court that § 236(c)(1) of the INA is unconstitutional on its face as violative of procedural and substantive due process rights. Kim also requests an order directing Thomas Schiltgen, District Director of the San Francisco INS, to release Kim from custody.

LEGAL STANDARD

A writ of habeas corpus may be issued when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2245(a). A request for federal habeas corpus relief must be based on a violation of federal law.

See Moore v. Calderon, 108 F.3d 261, 264 (9th Cir. 1997).

A federal statute is presumed constitutional unless shown otherwise. *Martinez v. Greene*, 28 F. Supp. 1275, 1281 (D. Colo. 1998). To prevail on a facial challenge to the constitutionality of a statute, the petitioner "must establish that no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

DISCUSSION

1. Jurisdiction.

The government does not contest this Court's jurisdiction under 28 U.S.C. § 2241 to entertain challenges to the constitutionality of § 236(c). *See* opposition, 5:10-11; *see also, Parra v. Perryman*, 172 F.3d 954, 957 (7th Cir. 1999).

2. Statutory history.

Congress addressed the deportability of criminal aliens in § 241 of the Immigration and Nationality Act of 1952. Under the old INA, an alien was subject to deportation if convicted of a "crime involving moral turpitude" and if the crime was committed within five years after entry into the United States. INA § 241(a)(4)(A). An alien convicted of violating drug or firearm laws was also deportable. INA § 241(a)(4) and (11). Release pending deportation was placed within the discretion of the Attorney General. INA § 223.[1]

[1] Section 223 of the INA provided that: "pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion

In 1988, Congress amended the criminal alien provisions of the INA in the Anti-Drug Abuse Act of 1988 (ADAA). The ADAA established a new category of deportable alien, "aggravated felon." Aggravated felonies were defined as murder, drug trafficking crimes, or illicit trafficking in firearms or destructive devices, and any attempt or conspiracy to commit such acts in the United States. INA §101(a). The ADAA required the Attorney General to take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence and barred the Attorney General from releasing the alien. INA § 242(a)(2).

The ADAA's mandatory detention of aggravated felons was immediately challenged as violative of due process, and was declared unconstitutional by the majority of courts which considered it. *See, e.g., Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990); *Kellman v. INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Probert v. INS*, 750 F. Supp. 252 (E.D. Mich. 1990), *aff'd on other grounds*, 954 F.2d 1253 (6th Cir. 1992); *Paxton v. INS*, 745 F. Supp. 1261 (E.D. Mich. 1990); *Agunobi v. Thornburgh*, 745 F. Supp. 533 (N.D. Ill. 1990). *But see Davis v. Weiss*, 749 F. Supp. 47 (D. Conn. 1990); *Morrobel v. Thornburgh*, 744 F. Supp. 725 (E.D. Va. 1990). In the wake of these successful constitutional challenges. Congress amended the INA in 1990 and 1991 "to permit release of those aggravated felons who were lawfully admitted to the United States, and who could demonstrate that they were not a threat to the

of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on condition of parole."

community and were likely to appear for their hearings." *Martinez*, 28 F. Supp.2d at 1279-80.

In April 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. No. 104-132, Stat. 1214 ("AEDPA"). AEDPA created automatic mandatory detention without eligibility to apply for bond for aggravated felons and other non-citizens with criminal convictions. AEDPA § 440(c), INA § 242(a)(2). Five months after AEDPA, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 1570 ("IIRIRA"). IIRIRA expanded the definition of an "aggravated felony" to include new crimes, *see* INA 101(a)(43), and replaced AEDPA's mandatory detention provision for criminal aliens with the provision at issue in the instant case. INA § 236(c).[2]

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[2] Section 236(c) governs the custody of criminal aliens pending their removal proceedings:

> (1) *Custody.* The Attorney General shall take into custody any alien who
>
> > (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2);
> >
> > (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D).
> >
> > (C) is deportable under section 237(a)(2)(A)(I) on the basis of an offense for which the alien has been sentenced to a term of imprisonment of at least 1 year, or
> >
> > (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
>
> (2) *Release.* The Attorney General may release an alien described in paragraph (1) only if the Attorney General decides pursuant to Section 3521 of title 18, United States Code, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien.

Subdivision (1) of § 236(c) requires the mandatory detention of certain criminal aliens during the pendency of their removal proceedings. Subdivision (2) provides a single exception to the mandatory detention provisions of subdivision (1) for participants in the federal witness protection program.[3]

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[3] Because of its concerns regarding insufficient detention space and INS personnel, the INS requested that the mandatory detention provisions of § 236(c) be held in abeyance for two years. During that time, the Transition Period Custody Rules ("TPCR") provided by IIRIRA § 303(b)(3) controlled the detention of criminal aliens. *See* Commissioner's Letter Invoking Temporary Period Custody Rules for FY 1998, Sept. 26, 1997, Respondents' Explanation Re: TPCR. Under the TPCR, a criminal alien was entitled to a bond hearing before an Immigration Court, at which the alien could show that he or she did not present a substantial risk of flight or threat to the community. The Immigration Court then had the discretion to grant bond for the duration of the alien's deportation proceedings. *See* IIRIRA § 303(b)(3).

3. Violation of due process.

Kim claims that he has been denied due process of law, in violation of the Fifth Amendment, because he has not had, and in fact by statute cannot have, a bail hearing to determine whether he is a suitable candidate for release pending his removal proceedings.[4] Kim argues that this mandatory detention under § 236(c) violates criminal aliens' rights to both substantive and procedural due process.

a. Substantive due process.

A petitioner's right to substantive due process prevents the government from conduct that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). Violations of substantive due process occur when the government interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937).

In evaluating whether § 236(c) violates aliens' substantive due process rights, Kim argues this Court should adopt the standard of review delineated in *United States v. Salerno*, 481 U.S. 739 (1987). The *Salerno* standard involves a two step analysis. First, the court determines whether the statute at issue is "impermissible punishment or permissible regulation." *Salerno*, 481 U.S. at 747. If it qualifies as a permissible regulation, the court then examines whether the

[4] From Kim's moving papers, the Court has been unable to determine if Kim is contesting the applicability of § 236(c)(1) to him. However, as Kim argues that § 236(c) is facially unconstitutional, the Court need not examine the particulars of Kim's own case.

statute is an excessive means of achieving the permissible goal. If it is excessive, then the statute violates the petitioners' substantive due process rights. *See id.* Kim argues this standard should govern this Court's examination of § 236(c).

Respondents contend that the *Salerno* test is overly strict and therefore inappropriate. Citing Congress' broad authority over immigration, respondents argue the Court must defer to Congress' judgment, and restrict its examination of §236(c) to the rational review test. Respondents suggest the "(unexacting) standard of rationally advancing some legitimate governmental purpose," a standard applied in *Reno v. Flores*, 507 U.S. 292, 305 (1993).

It is clear that lawful resident aliens possess substantive due process rights during deportation proceedings. *See Landon v. Plasencia*, 459 U.S. 21, 33 (1982) ("Once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly."); *see also Flores*, 507 U.S. at 306 ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."); *Mathews v. Diaz*, 426 U.S. 67 (1976).

While lawful resident aliens do enjoy substantive due process rights, Congress has the power to limit those rights. Congress' power over immigration is plenary, and it may accordingly promulgate rules for aliens "that would be unacceptable if applied to citizens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977). It has been stated that "over no conceivable subject is the legislative power of Congress more complete" than over immigration. *Id.* The effect of this extraordinary breadth of Con-

gressional power is to crutail judicial review of immigration policy. As the Supreme Court has stated, "[o]ur cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments, largely immune from judicial control." *Shaughnessy v. Mezei*, 345 U.S. 206, 210 (1953).

Despite Congress' plenary authority over immigration, however, there is a distinction between substantive immigration policy and the procedures by which that policy is implemented. While courts must defer to Congress' authority when reviewing substantive immigration policy, there is no such restriction to their review of the rules that implement or enforce that policy. Specifically, Congress' decisions about the admissibility and deportability of aliens must be accorded deference by the courts, but the courts may require Congress to "respect the procedural safeguards of due process" in the *implementation* of those decisions. *Fiallo*, 430 U.S. at 792 n 4. The Supreme Court has recognized this distinction between the level of review appropriate for substantive versus procedural immigration legislation. In *INS v. Chadha*, 462 U.S. 919 (1983), for example, the Court, while reviewing a challenge to the constitutionality of a section of the INA, stated that

> [t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing that power.* As we made clear in *Buckley v. Valeo*: "Congress has plenary authority in all cases in which it has substantive legislative

> jurisdiction, *so long as the exercise of that authority does not offend some other constitutional restriction.*"

Chadha, 462 U.S. at 940-41 (emphasis added) (internal citations omitted). Courts therefore may examine the procedural means by which Congress reaches its substantive immigration ends under a stricter standard than pure deference.

Several courts have recently held that § 236(c) is a procedural statute, rather than one embodying substantive immigration policy. "Indefinite detention of aliens ordered deported is not a matter of immigration policy; it is only a means by which the government implements Congress' directives." *Phan v. Reno*, __ F. Supp. 2d __, 1999 WL 521980 (W. D. Wash. 1999). The court in *Martinez v. Greene*, 20 F. Supp. 2d 1275, 1281 (D. Colo. 1998), in examining a facial challenge to § 236(c) identical to the case at bar, characterized the petitioner's case as "challeng[ing] the method by which the immigration statutes are implemented," rather than implicating Congress' plenary authority over substantive immigration policy.

The Court agrees that § 236(c) is not substantive immigration legislation. The statute does not determine which aliens are deportable and which are not, nor does it confer or deny entitlements. Such determinations and categorical "line-drawing" are the hallmarks of immigration policy legislation. *See Fiallo*, 430 U.S. at 797-98. In contrast, § 236(c) simply delineates the procedure for detaining aliens already determined by Congress to be deportable. As Judge Smith stated in *Danh v. Demore*, __ F. Supp. 2d __, Slip Op. C 99-1531 FMS (N.D. Cal. 1999), "[m]andatory detention with no

possibility of bond is not a simple . . . policy decision that a system of ordered liberty can entrust solely to the political branches of government. It is only ancillary to substantive immigration policy and, as such, does not escape searching judicial review." *Danh*, ___ F. Supp. 2d at ___, Slip Op. at 12:9-14. Since § 236(c) is only "a method by which the immigration statutes are implemented," and accordingly not entitled to deferential review, the Court applies the *Salerno* standard. *Martinez*, 28 F. Supp. 2d at 1281.

Respondents' reliance on the standard used in *Flores* is accordingly inapposite. In *Flores*, juvenile aliens brought a class action suit against the INS for violations of substantive due process. The juvenile aliens were detained under INS regulations preventing their release unless they could show they could be released to the custody of a parent or legal guardian. *Flores*, 507 U.S. at 294-98. In determining which standard of review to apply, the Supreme Court rejected a strict scrutiny standard because a fundamental liberty interest was not at stake. *See id.* at 299-300, 305-306. First, as juveniles, the petitioners were always in some form of custody, and accordingly had no fundamental right to be released into a non-custodial setting. *See id.* at 301-03. Second, the petitioners were not being detained in jail or prison, but in low-security facilities meeting "state licensing requirements for shelter care, foster care . . . and related services to dependent children." *Id.* at 298. Finally, as aliens, the petitioners were subject to Congress' plenary authority over immigration, and accordingly possessed a lesser right to substantive due process.

Flores is distinguishable from the present case. Unlike the juvenile aliens in *Flores*, criminal aliens detained by § 236(c) are adults, with a full interest in being free from custody, and are in fact detained in jail, rather than in surroundings approximating foster care. Nor is Congress' plenary authority over immigration dispositive, since the regulations at issue here reflect not substantive immigration policy, but rather procedural implementation of it.

Respondents also contend that since *Salerno* was a criminal case, and deportation proceedings are classified as civil proceedings, the *Salerno* standard is inapposite. Respondents argue that as criminal defendants are afforded procedural safeguards to which aliens are not entitled, such as the presumption of innocence and the right to a speedy trial, a standard of review that evolved from a criminal case cannot be applicable to aliens. The Court finds this argument unpersuasive. What is at stake is not the presumption of innocence or right to a speedy trial, but the right to be free from bodily restraint. While aliens may not possess rights to the former, they certainly enjoy a right to the latter. *See Wong Wing v. United States*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth] amendments."); *see also Harisiades v. Shaughnessy*, 342 U.S. 580, 586-87 n.9 (1952) (immigrants stand "on an equal footing with citizens" under the Constitution with respect to protection of personal liberty). As the court stated in *Danh*, "[i]t strains the imagination that individuals detained because of criminal activity should have more rights than those held simply for regulatory purposes." *Danh*, __ F. Supp. 2d at __, Slip Op. at 13:9-11. The

fact that the *Salerno* standard emerged from a criminal case does not obviate its relevance here. Indeed, the *Salerno* test has been used by all courts reviewing the constitutionality of § 236(c) but one. *See Diaz-Zaldierna v. Fasano*, 43 F. Supp. 2d 1114 (S.D. Cal. 1999), *Van Eeton v. Beebe*, __ F. Supp. 2d __ , 1999 WL 312130 (D. Or. 1999), *Martinez*, 28 F. Supp. 2d 1275, *Danh*, _F. Supp. 2d __, Slip Op. C 99-1531 FMS; *but see Parra*, 172 F.3d 954.

In applying the *Salerno* test,[5] a court must first determine whether the infringement on liberty at issue is "impermissible punishment or permissible regulation." *Salerno*, 481 U.S. at 747. The Supreme Court has held that deportation is regulatory, not punitive. *See INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984); *see also Carlson v. Landon*, 342 U.S. 524, 537 (1952). As for the legitimacy of the regulation, in its enactment of IIRIRA, which amended the INA to include § 236(c), Congress referred to several valid motivations. Congress wished to prevent criminal aliens from absconding during their removal proceedings, as at the time twenty percent of criminal aliens released on bond did not return for deportation. Congress was also motivated by the need to protect the public from potentially dangerous criminal aliens, and to restore public confidence in the immigration system. *See* S. Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285 (Leg. Hist.) at 1-6, 9, 18-23). These are legitimate and per-

[5] At oral argument, the Court inquired of government counsel what the result in this case should be if the *Salerno* test were applied to § 236(c), and counsel responded that petitioner Kim would get his bail hearing. However, since respondent's briefing suggests to the contrary, the Court will analyze the statute in light of *Salerno*.

missible goals, well within Congress' plenary power over immigration policy. Accordingly, § 236(c) passes the first prong of the *Salerno* test as permissible regulation.

The next step is to determine whether the infringement on liberty is "excessive in relation to the regulatory goal Congress sought to achieve." *Salerno*, 481 U.S. at 747. Respondents argue that in light of a twenty percent abscondence rate, mandatory detention for all criminal aliens pending deportation is not excessive. The Court disagrees. To obtain its goals regarding a relatively small minority of criminal aliens, section 236(c) applies to *every* criminal alien an irrebuttable presumption that they pose a flight risk and/or a danger to the community. In *Carlson*, the Supreme Court stated that such blanket presumptions, with no safeguards to protect due process rights, are impermissible. In that case, the Supreme Court affirmed the detention of Communist aliens, but specifically cited the Attorney General's discretion to grant bond as a factor in its decision. The Court stated, "[o]f course purpose to injure *could not be imputed generally to all aliens subject to deportation.*" *Carlson*, 342 U.S. at 538 (emphasis added). Yet this is precisely what § 236(c) does. While the government's goals are valid, § 236(c) simply paints with too broad a brush. That twenty percent of criminal aliens do not return for deportation cannot justify mandatory detention without a bail hearing for the remaining eighty percent. As the *Martinez* court stated, "Due process demands more." *Martinez*, 28 F. Supp. 2d at 1283. Less excessive means exist for accomplishing Congress' goals, such as having individualized bail hearings. Section 236(c) accordingly fails the second prong of the *Salerno* test, as an ex-

cessive infringement of criminal aliens' rights to substantive due process.

Salerno and *Carlson* both support this result. In *Salerno*, the Supreme Court upheld the Bail Reform Act's pretrial detention measures, in part because "[t]he arrestee [was] entitled to a prompt detention hearing" and the Attorney General had discretion to grant bail. *Salerno*, 481 U.S. at 747. In contrast, the Attorney General has no discretion to grant either bail or a bail hearing under § 236(c), as the statute requires mandatory detention. In the absence of that discretion, § 236(c)'s infringement on the aliens' liberty interest becomes excessive. In *Carlson*, the Attorney General had discretion to release Communist aliens on bail pending their deportation, but chose to deny bail. The Supreme Court upheld the Attorney General's decision as falling within his discretion, but pointed out that the *existence* of that discretion was crucial. *Carlson*, 342 U.S. at 538. Again, § 236(c) contains no discretionary provisions. Instead, a purpose to injure is imputed generally to aliens subject to deportation, in direct contradiction to the Supreme Court's admonition in *Carlson*. This blanket presumption is simply excessive in relation to Congress' goals.

Other district courts have granted petitions for writs of habeas corpus based on § 236(c), but have generally restricted their analysis to the constitutionality of § 236(c) as applied to individual petitioners. *See, e.g.*, *Van Eeton*, __F. Supp. 2d __ , 1999 WL 312130, *Danh*, __ F. Supp. 2d __, Slip Op. C 99-1531 FMS, *Phan*, __ F. Supp. 2d __, 1999 WL 521980. The district court in *Diaz-Zaldierna* found that § 236(c) was not unconstitutional as applied to the petitioner, in part because the

petitioner had a hearing scheduled to determine whether
§ 236(c) even applied to his case. *Diaz-Zaldierna*, 43 F. Supp. 2d at 1120. Because these courts conducted as-applied analysis, they did not reach the question now before this Court, whether § 236(c) is facially unconstitutional.

The two courts that have addressed this facial issue have reached different conclusions. *Martinez* held that the mandatory detention strictures of § 236(c) are excessive in light of Congress' goals, and accordingly that they violate substantive due process. *Martinez*, 28 F. Supp. at 1282. In *Parra*, the Seventh Circuit applied a purely deferential standard to its review of § 236(c), and found that it "plainly is within the power of Congress." *Parra*, 172 F.3d at 958. *Parra*'s result, however, is distinguishable. The *Parra* court did not apply the *Salerno* test, as the court deferred to Congress' plenary power over immigration and accordingly did not look beyond the rational review test.[6] As explained above, this Court has determined that § 236(c) is a procedural implementation of immigration policy, and so examination of the statute under the *Salerno* test is appropriate. Under the second prong of that test, § 236(c) is excessive in light of its goals.

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[6] In addition, the *Parra* court analyzed the constitutionality of § 236(c) in reference to an abscondence rate of 90%. *Parra*, 172 F.3d at 956. The Congressional records, however, indicate a 20% abscondence rate. *See*, S. Rep. No. 48, 104th Cong., 1st Sess. (1995) (1995 WL 170285) (Leg. Hist.) At 1-6, 9, 18-23. Respondents refer to the 20% abscondence rate, as did the court in *Danh*. *See* Respondents' Opposition, 13:19-20; *see also Danh*, __ F. Supp. 2d __ , Slip Op. at 13:26-14:2.

For the reasons stated above, the Court finds that § 236(c) is unconstitutional on its face, having failed the second prong of the *Salerno* test. Mandatory detention of all criminal aliens under § 236(c) is plainly excessive in light of Congress' goals, and therefore violates substantive due process.

b. Procedural due process.

Kim also argues that § 236(c)(1) violates criminal aliens' rights to procedural due process.[7] "[P]rocedural due process requires that [a] restriction [on liberty] be implemented fairly." *Salerno*, 481 U.S. at 746. To determine whether a given procedure, statute, or governmental conduct violates a petitioner's right to due process, courts apply the three-step analysis from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The court must evaluate the private interest that will be affected by the official action; the risk of erroneous deprivation of the private interest, and the effect of any additional safeguards on that risk; and the government's interest in maintaining the current procedures. *See id.*

Despite respondents' contentions to the contrary, resident legal aliens are entitled to procedural due pro-

[7] Once a court finds that a petitioner's substantive due process rights have been violated, it is not strictly necessary to evaluate possible violation of his or her procedural due process rights. "Only when a restriction on liberty survives substantive due process scrutiny does the further question of whether the restriction is implemented in a procedurally fair manner become ripe for consideration." *Danh*, __ F. Supp. at __, Slip Op. at 20:11-14. However, the Court will consider petitioner's procedural due process claim, should it later be determined that § 236(c) does not violate substantive due process.

cess protection under *Mathews*. Respondents argue that "[b]ecause of Congress' plenary power over immigration and its right to detain aliens as part of the removal process, all that procedural due process requires is 'some level of individualized determination' to ensure that the alien's detention pending his removal is not arbitrary." Respondents' Return and Opposition to Petition for Writ of Habeas Corpus, 15:3-6. Respondents' assertion is misplaced, as § 236(c), a procedural implementation of Congress' immigration policy, does not merit this kind of deferential review. The Court also notes that many courts have applied *Mathews* when reviewing both § 236(c) and its predecessor, ADAA 7343(a). *See e.g., Van Eeton*, __ F. Supp. __, 1999 WL 312130; *Martinez*, 28 F. Supp. at 1282; *Leader v. Blackman*, 744 F. Supp. 500, 508 (S.D.N.Y. 1990); *Paxton v. INS*, 745 F. Supp. 1261, 1266 (E.D. Mich. 1990). Respondents' position seems particularly untenable since *Parra*, the case upon which respondents heavily rely for many of their arguments, also applied the *Mathews* test to determine the petitioner's procedural due process rights. Accordingly, the procedural due process rights of aliens under § 236(c) must be evaluated under the *Mathews* test.

The private interest at stake here is "great—the right to be free of indefinite and possible long-term detention pending a deportability determination." *Martinez*, 28 F. Supp. 2d at 1283. The *Danh* court called the private interest "fundamental to any democratic society: the right to freedom from arbitrary detention." *Danh*, __ F. Supp. 2d at __, Slip Op. at 21:25-27. The risk of erroneous deprivation of that interest is substantial, since under § 236(c) no procedures exist to determine whether the given in-

dividual merits release on bond. Additional safeguards are readily available, as for example the bond hearing procedures which were in place during the transitional period under IIRIRA § 303(b)(3). Finally, the burden on the government in changing its procedures is minimal. Since criminal aliens already must come before an Immigration Judge for a determination of whether § 236(c) applies to them, the government could reinstitute bond hearings at that same time. While the government's interest in preventing alien abscondence and protecting the public is strong, it is insufficient to overrule the stronger private interest and high risk of erroneous deprivation of that private interest. Accordingly, the Court finds that § 236(c) violates criminal aliens' rights to procedural due process.

CONCLUSION

For the foregoing reasons, the Court finds and declares that § 236(c) violates criminal aliens' rights to substantive and procedural due process. The mandatory detention provision of § 236(c) fails to provide any meaningful procedure to detained aliens; accordingly, there are no circumstances under which § 236(c) could be valid. It is therefore unconstitutional on its face. Kim's application for a writ of habeas corpus is GRANTED to the extent that respondents shall promptly provide Kim with an individualized bond hearing, pursuant to IIRIRA's Transition Custody Rules, IIRIRA § 303(b)(3), or otherwise as respondents may elect, to determine whether Kim is a flight risk or a danger to the community.

IT IS SO ORDERED.

Dated: August 10, 1999

/s/ SUSAN ILLSTON
SUSAN ILLSTON
United States District Judge